No. SC85565

IN THE SUPREME COURT OF MISSOURI

KENNETH S. SMITHER,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

Appeal from the Platte County Circuit Court The Honorable Daniel M. Czamanske, Judge

RESPONDENT'S SUBSTITUTE BRIEF

KELEHER & EASTMAN

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JURISDICTIONAL STATEMENT

The Director of Revenue revoked Respondent Kenneth Smither's driving privilege pursuant to the provisions of § 577.041 R. S. Mo. (2000). After judicial review, the Circuit Court of Platte County, Missouri reinstated those privileges. The Court of Appeals for the Western District affirmed and denied rehearing or transfer. After an opinion by the Court of Appeals for the Western District, this Court took transfer of the case on the Director's application. Therefore, jurisdiction lies in this Court. Article V, Section 10, Missouri Constitution (as amended, 1982).

STATEMENT OF FACTS

Steve Salfrank is a Trooper with the Missouri Highway Patrol. [Tr. p. 3]. He was so employed on December 23, 2001. [Tr. p. 3]. On that date, he was dispatched to an accident in the area of I-29 and 152 Highways in Platte County, Missouri. [Tr. pp. 3-4]. Upon his arrival, he saw a vehicle on its top against the concrete barrier on the left side of the Interstate. [Tr. p. 4]. Based on his observations, he determined that the vehicle had left the left side of the roadway from the ramp from Missouri 152 that leads onto northbound I-29, struck a ditch or embankment between the ramp and I-29, overturned and then crossed three lanes of I-29. [Tr. p. 5].

While at the scene, he had an opportunity to speak with Ken Smither. [Tr. pp. 5-6]. He thought that Smither was the driver because there was no one else at the scene that was involved with the accident or had received injuries from an accident. [Tr. pp. 6-7].

Trooper Salfrank first made contact with Mr. Smither while he was lying on the ground behind the vehicle on the left shoulder of I-29. [Tr. p. 7]. During this conversation, the only thing Mr. Smither told Trooper Salfrank was that he could not remember what had happened. [Tr. p. 7]. The paramedics arrived shortly after Trooper Salfrank. [Tr. p. 17]. Upon their arrival, they assumed care of Mr. Smither. [Tr. p. 17]. They provided him medical attention, placed him in the ambulance and transported him to the hospital. [Tr. p. 17].

Trooper Salfrank spoke with Mr. Smither briefly while he was in the ambulance. [Tr. p. 17]. Trooper Salfrank did not ride with Mr. Smither in the ambulance. [Tr p. 17]. Trooper Salfrank did not follow in immediate pursuit of the ambulance in its transport of Mr. Smither. [Tr. p. 18].

Trooper Salfrank eventually responded to the hospital. [Tr. p. 8]. Trooper Salfrank made contact with Mr. Smither there. [Tr. p. 8]. At the hospital, Trooper Salfrank asked Mr. Smither if he had been drinking that night. In response, Mr. Smither acknowledged that he had. [Tr. p. 8]. While at the hospital, Trooper Salfrank also performed a Gaze Nystagmus Test. [Tr. p. 8].

Based upon these observations of Mr. Smither and Mr. Smither's statement, Trooper Salfrank determined that Mr. Smither was intoxicated. [Tr. p. 9]. Trooper Salfrank then told Mr. Smither he was under arrest. [Tr. p. 9]. He advised Mr. Smither of his rights and read the implied consent advisory to him. [Tr. p. 9]. After reading the implied consent advisory, Mr. Smither told Trooper Salfrank that he wanted to contact his attorney. [Tr. p. 10]. Trooper Salfrank waited approximately 40 minutes for Mr. Smither's attorney to call. [Tr. pp. 10-11]. It was Trooper Salfrank's recollection that Mr. Smither actually contacted his parents, who attempted to contact an attorney for him. When Mr. Smither's parents had not called back after the lapse of almost 40 minutes, Trooper Salfrank again asked Mr. Smither to submit to a blood alcohol test. [Tr. p. 11]. Mr. Smither refused. [Tr. p. 11].

Trooper Salfrank then issued a notice of revocation, a summons for driving while intoxicated and a summons for careless and imprudent driving. [Tr. p. 11].

Trooper Salfrank never placed Mr. Smither in handcuffs. [Tr. pp. 18-19]. Mr. Smither

was never shackled. [Tr. p. 19]. Trooper Salfrank was the only officer who arrived at the hospital that evening with respect to Mr. Smither. [Tr. p. 19]. Trooper Salfrank did not require Mr. Smither to post a bond. [Tr. p. 19]. He did not turn Mr. Smither over to any other law enforcement officer. [Tr. p. 19]. In fact, Trooper Salfrank did not have Mr. Smither even sign the tickets written. [Tr. pp. 19-20].

Trooper Salfrank never moved Mr. Smither or asked him to move from the place he had found him when he arrived at the scene. [Tr. p. 20]. In fact, only the paramedics gave any direction or assistance to Mr. Smither as far as where to go and how to go. [Tr. p. 20]. It was Trooper Salfrank's understanding and belief that once at the hospital, the paramedics turned Mr. Smither's care over to hospital personnel. [Tr. p. 18].

POINT RELIED ON

The trial court properly set aside the Director's decision to

administratively sanction Respondent's driving privilege under § 577.041 R.S. Mo in that the trial court found that the Director failed to sustain her burden of proof that Respondent was arrested because the law enforcement officer neither actually restrained Respondent, nor did Respondent submit to the custody of the law enforcement officer.

Callendar v. Director of Revenue, 44 S.W.3d 866, 868-869 (Mo. App. W.D. 2001)

Hinnah v. Director of Revenue, 77 S.W.3d 616, 619-620 (Mo. banc 2002)

State v. Nicholson, 839 S.W.2d 593, 596-97 (Mo. App. W.D. 1992)

ARGUMENT

The trial court properly set aside the Director's decision to administratively sanction Respondent's driving privilege

under § 577.041 R.S.Mo in that the trial court found that the Director failed to sustain her burden of proof that Respondent was arrested because the law enforcement officer neither actually restrained Respondent, nor did Respondent submit to the custody of the law enforcement officer.

Callendar v. Director of Revenue, 44 S.W.3d 866, 868-869 (Mo. App. W.D. 2001)

Hinnah v. Director of Revenue, 77 S.W.3d 616, 619-620 (Mo. banc 2002)

State v. Nicholson, 839 S.W.2d 593, 596-97 (Mo. App. W.D. 1992)

An appellate court will affirm the trial court's judgment unless there is no substantial evidence to support it, unless the decision is contrary to the weight of the evidence, or unless the trial court erroneously declares or applies the law. *Verdoorn v. Director of Revenue*, 2003 Mo. LEXIS 133 (Mo. 2003) *citing Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). In considering the trial court's decision, the evidence and all resulting inferences are to be viewed in a light most favorable to the judgment.. We are to disregard all contrary evidence and inferences. *Jarrell v. Director of Revenue*, 41 S.W.3d 42, 46 (Mo. App. S.D. 2001).

The Director bears the burden of proof to support the revocation of a person's license for refusal to submit to a chemical test. *Keim v. Director of Revenue*, 86 S.W.3d 177, 180 (Mo. App. E.D. 2002). Her failure to satisfy that burden results in the reinstatement of the person's driver's license. *Litzsinger v. Director of Revenue*, 115 S.W.3d 866, 868 (Mo. App.

E.D. 2003) citing *Keim v. Director of Revenue*, 86 S.W.3d 177, 180 (Mo. App. E.D. 2002). To sustain her burden, the Director must prove by a preponderance of the evidence:

- (1) Whether or not the person was arrested . . .;
- (2) Whether or not the officer had (a) Reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated or drugged condition; and
- (3) Whether or not the person refused to submit to the test. § 577.041.4 R. S. Mo. (2000) If the court determines any issue not to be in the affirmative, the court shall order the director to reinstate the license or permit to drive. § 577.041.5 R. S. Mo. (2001). *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 619-620 (Mo. banc 2002). This appeal concerns the first issue, whether or not the person was arrested.

Arrest is statutorily defined as "an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority of a warrant or otherwise." §544.180 R.S. Mo.(2001) This definition is clear and unambiguous.

Courts must give effect to a statute as written. *Boone County v. County Employees' Ret. Fund*, 26 S.W. 3d 257, 264 (Mo. App. W.D. 2000). Our responsibility is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning. *State v. Rousseau*, 34 S.W. 3d 254, 259 (Mo. App. W.D. 2000). The legislature is presumed to have intended what the statute says; consequently, when the

legislative intent is apparent from the words used and no ambiguity exists, there is no room for statutory construction.

Cook v. Cook, 97 S.W.3d 482, 485 (Mo. App. W.D. 2002) citing State v. Rousseau, 34 S W. 3d 254, 259 (Mo. App. W.D. 2000).

"Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning. *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). The legislature may wish to change the statute But this Court, under the guise of discerning legislative intent, cannot rewrite the statute." *State v. Rowe*, 63 S.W.3d 647, 649-650 (Mo. banc 2002).

An arrest may be affect in one of two alternative ways. Either an officer may occasion the actual restraint of the person of the defendant or the defendant must submit to the custody of the officer. § 544.180. R.S. Mo. (2001).

"Actual" means real, or existing at the moment . . . *Southern Agency Co. v. Hampton Bank of St. Louis*, 452 S.W.2d 100, 105 (Mo. 1970) *citing Webster's New Word Dictionary*, 1963. Clearly there was no evidence of any actual restraint of Mr. Smither. He was neither cuffed nor shackled. [Tr. pp 18-19]. There was no evidence that Trooper Salfrank even touched Mr. Smither. Although the Director's substitute brief does not expressly concede the absence of evidence as to this method of arrest, she proffers little in the way of argument in support of this position. She has effectively abandoned this point on appeal.

Her focus is primarily directed to the remaining means, an arrest occasioned through the submission to the custody of the officer. On close examination, this argument fails. The Director suggests that Trooper Salfrank exerted his authority over Mr. Smither by:

- 1)telling him that he was under arrest;
- 2) advising him of his *Miranda* rights;
- 3) reading him the Implied Consent advisory; and
- 4) issuing him summonses.

Since Mr. Smither invoked his rights, asked if he could contact an attorney, and did not otherwise manifest any sign or suggestion that he was not accepting the trooper's assertion of authority, the Director suggests he necessarily acquiesced to the trooper's assertion of authority.

The Director argues that Mr. Smither's arrest was effected when Trooper Salfrank told him he was under arrest. [Tr. p. 9]. The Director made a similar argument in *Callendar v*. *Director of Revenue*, 44 S.W.3d 866, 868-869 (Mo. App. W.D. 2001). In *Callendar*, that argument was properly rejected. "An arrest is not effected merely by an officer telling a suspect that he or she is under arrest one or more times." *Callendar v. Director of Revenue*, 44 S.W.3d 866, 868-869 (Mo. App. W.D. 2001) *quoting State v. Nicholson*, 839 S.W.2d 593, 596-97 (Mo. App. W.D. 1992).

If this Court is to respect the legislature's definition of arrest and such definition is to retain its validity, this Court must likewise reject any suggestion that an officer's announcement, "You are under arrest" is sufficient to constitute an arrest.

Like the oral pronouncement, "You are under arrest," advising an individual of the rights afforded under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966) cannot supercede

the general assembly's express mandate as to what conduct equates with an arrest. This position neither minimizes the significance of nor the necessity for such a warning. Rather, it emphasizes that an "arrest" may only be accomplished through either the actual restraint of the defendant or the defendant's submission to the custody of the officer. Absent such an approach, an officer could unilaterally determine the moment of arrest through his statements.

Similarly, reading to Mr. Smither the "Implied Consent Advisory" is focusing exclusively upon the conduct of the trooper. [Tr. p. 9]. What did the arresting officer do? Had the legislature sought to focus on such conduct, it could have easily so indicated by defining arrest in terms of the officer's statements. Of course, implicit would be the assumption that such definition would pass constitutional scrutiny. However, this Court need not address such an issue as it is bound by the legislature's actual definition.

Finally, issuing a summons to Mr. Smither again considers the actions of the trooper, not Mr. Smither. [Tr. p. 11]. The Director focuses upon what the officer did. While it may have been the intent of the trooper to arrest Mr. Smither, the trooper's intent is not determinative. *See State v. Nicholson*, 839 S.W.2d 593, 594 (Mo. App. W.D. 1992) where the officer's conduct clearly reflected her desire to arrest Mr. Nicholson. Despite the same, the court found that Mr. Nicholson had not been arrested.

The Director suggests that she made a prima facie case. She argues that the burden shifted to Mr. Smither to rebut her prima facie case.

"Prima facie" as an adjective is defined as "sufficient to establish

a fact or raise a presumption unless disproved or rebutted a prima facie showing" BLACK'S LAW DICTIONARY at 1209. A "prima facie case" is defined as "the establishment of a legally required rebuttable presumption" or "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Id. "Prima facie evidence" is "evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced."

Hobbs v. Dir. of Revenue, 109 S.W.3d 220, 222 (Mo. App. E.D. 2003) quoting BLACK'S LAW DICTIONARY, 579, 1209 (7th ed. 1999).

According to the Director, Mr. Smither submitted to the trooper's show of authority by 1) invoking his rights; 2) asking to contact an attorney; and 3) "otherwise failing to manifest any sign or suggestion that eh was not accepting the trooper's assertion of authority over him."

Contrary to the Director's position, the statute defines arrest in terms of *submission* to the custody of the officer and <u>not</u> submitting to an assertion of authority over the defendant. § 544.180 R.S.Mo (2001). If an arrest is to be defined as argued by the Director, then an arrest would occur once an individual responds to emergency lights by pulling to the side of the roadway. By engaging his lights the trooper is asserting his authority over a driver. If the driver yields to such a signal, he has effectively submitted to this demonstrated show of authority. Certainly, neither the legislature nor the courts of this state are prepared to embrace

such a expansive definition of arrest. Instead, arrest is and should be defined in terms of *submitting to the custody* of the officer. It is the act of submission which manifests itself in an arrest. Application of this definition demands more than simply respecting the trooper's status and acquiescing in his assertions.

"Custody" is "the actual corporeal detention of a prisoner or where one exercises control over the custody of another which confines such other person within certain limits." *State v. Lorenze*, 596 S.W.2d 762, 764 (Mo. App. S.D. 1980) *citing State v. Baker*, 355 Mo. 1048, 199 S.W.2d 393 (Mo. 1947). It is the real or existing physical confinement; the exertion of control over another through confinement or restraint.

The record before this Court is barren of any evidence which would suggest that Trooper Salfrank detained Mr. Smither or restricted his movements. [Tr. pp. 10-11]. From the accident scene, Trooper Salfrank went to Liberty Hospital. [Tr. p. 8]. There he found Mr. Smither in the emergency room. He engaged Mr. Smither in conversation and administered a horizontal gaze nystagmus test. [Tr. p. 8]. He told Mr. Smither he was under arrest, *Mirandized* him and read him the implied consent advisory. [Tr. p. 9]. Mr. Smither declined to make any statement and requessted an opportunity to speak with an attorney. [Tr. p. 10].

There is no evidence suggesting that Trooper Salfrank asserted any control over Mr. Smither or the room he occupied. There is no evidence that Trooper Salfrank remained with Mr. Smither as he attempted to contact counsel. There is no evidence that Mr. Smither stayed in the same room as Trooper Salfrank as he attempted to contact counsel. From the record, there were no limitations or restrictions placed upon Mr. Smither by Trooper Salfrank.

The Director also argues that an arrest was occasioned upon the issuance of the summonses. Once more, the Director is mistaken. The Director looks to the actions of the trooper and not the reactions of the Mr. Smither. The unilateral actions of the Trooper in preparing a written instrument hardly effects a restraint upon the person of Mr. Smither nor occasions his confinement.

This Court has been loath to rewrite legislation simply to embrace what may have been the actual intent of the general assembly. For instance, in *State v. Rowe*, 63 S.W.3d 647, 649-650 (Mo. banc 2002) this Court rejected a request to rewrite §302.321 so as to delete the statutory requirement that the defendant's license be suspended "under the laws of this state."

The state wants this Court to construe the statute to achieve this result. . . . Despite the phrase "under the laws of this state," it seems unlikely that the Missouri legislature intended to let out-of-state drivers with multiple offenses suffer only the consequences of a misdemeanor for driving after revocation while subjecting Missouri drivers to a felony for the same act. [However] Legislative intent can only be derived from the words of the statute itself. Spradlin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. 1998).

Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning.

*Kearney Special Rd. Dist. v. County of Clay, 863 S.W.2d 841,

842 (Mo. banc 1993). The legislature may wish to change the statute to cover out-of-state multiple-offense drivers such as Rowe. But this Court, under the guise of discerning legislative intent, cannot rewrite the statute.

State v. Rowe, 63 S.W.3d 647, 649-650 (Mo. 2002) (emphasis added).

Likewise in *Baldwin v. Director of Revenue*, 38 S.W.3d 401, 406-407 (Mo. 2001) this Court rejected the Director's request to rewrite §302.505.1 R.S. Mo. so as to include the phrase "but less than .10%". In its opinion, this Court observed,

(T)hose words do not appear in any of the relevant 1996 amendments. The Court will not assume the General Assembly intended to use words that do not appear in the text of the amended statute and which are inconsistent to what is clearly expressed. . . . If more words need to be added, the director should look to the General Assembly.

Baldwin v. Director of Revenue, 38 S.W.3d 401, 406-407 (Mo. 2001)

Section 544.180 R.S.Mo. is clear and unambiguous. Despite this lack of ambiguity, the Director asks this Court to rewrite the statute so as to negate the express mandates of the enactment. This Court must decline such an invitation. As noted in *Baldwin*, 38 S.W.3d 401, 407, "If more words need to be added, the director should look to the General Assembly."

CONCLUSION

The trial court properly found that the Director failed to sustain her burden of proof as

to the element of arrest. The trial court correctly set aside the administrative sanction sought by the Director. The Western District on appellate review agreed. Respondent asks this Court to affirm the trial court's decision setting aside the administrative sanction of his operating privilege.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify:

- 1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3831 words, excluding the cover and this certification, as determined by WordPerfect 9 software; and
- 2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
- 3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 29th day of December, 2003, to:

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